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STEVEN KIM

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SECOND MEASURE, INC., a Delaware corporation,

Plaintiff,

v.

STEVEN KIM, an individual,

Defendant.

AND RELATED COUNTERCLAIMS.

CASE NO.: 3:15-cv-03395-JCS

DEFENDANT STEVEN KIM'S TRIAL BRIEF

REDACTED VERSION OF DOCUMENT SOUGHT TO BE FILED UNDER SEAL

Judge: Hon. Joseph C. Spero
Pretrial Conf: May 19, 2017
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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. THE EVIDENCE AT TRIAL WILL SHOW BEYOND ANY DOUBT THAT MR. KIM AND MR. BABINEAU FORMED SECOND MEASURE AS A PARTNERSHIP UNDER CALIFORNIA LAW IN SEPTEMBER 2013. 4

III. ONCE MR. KIM AND MR. BABINEAU FORMED A PARTNERSHIP CALIFORNIA LAW PROHIBITED MR. BABINEAU FROM EJECTING MR. KIM FROM THE BUSINESS AND APPROPRIATING IT FOR HIMSELF 6

IV. MR. BABINEAU BREACHED HIS FIDUCIARY DUTY OF LOYALTY TO MR. KIM BY INCORPORATING SECOND MEASURE UNDER HIS OWN NAME AND CONTINUING THE BUSINESS WITHOUT MR. KIM. 7

V. SECOND MEASURE THE CORPORATION IS A DE FACTO CONTINUATION OF SECOND MEASURE THE PARTNERSHIP 9

VI. IMPOSITION OF A CONSTRUCTIVE TRUST OVER SECOND MEASURE AND/OR ITS EQUITY SECURITIES IS A PROPER REMEDY FOR MR. KIM'S CLAIMS FOR BREACH OF FIDUCIARY DUTY. 10

VII. CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Heckmann v. Ahmanson
(1985) 168 Cal.App.3d 119, 134 10

Interserve, Inc. v. Fusion Garage PTE. LTD.,
2010 WL 3339520, at *6 (N.D. Cal., Aug. 24, 2010) 6, 8

Lund v. Albrecht
(9th Cir. 1991) 936 F.2d 459, 464 10

PCO, Inc. v. Christensen, Miller, Fink, Jacobs Glasser,
150 Cal App. 4th 384, 398 2007 10

Second Measure, Inc. v. Kim,
143 F. Supp. 3d 961, 978 (N.D. Cal. 2015) 4, 6, 7

Sterman v. Ziem (1936)
17 Cal.App.2d 414, 418, 62 P.2d 160, 162 4

Weiner v. Fleishman,
54 Cal. 3d 476, 492-83 (1991) 4

Statutes

Cal. Corp. Code Section 1602(a) 4

Cal. Corp. Code Section 16404(b) 6

Fed. R. Civ. Proc. 54(c) 10

Cal. Code Civ. Proc. Section 2400 4

I. INTRODUCTION

Defendant and counterclaim-plaintiff Steven Kim respectfully submits this Trial Brief in connection with the trial set to commence in this matter on June 1, 2017.

General Nature of the Dispute

This case involves a dispute between two long-time friends and former business partners over a business they created together in September 2013. That business now goes by the name Second Measure, Inc., ("Second Measure"), and it is a plaintiff and counterclaim-defendant in this action. Although this case is in federal court, all of the substantive claims in this action arise under California state law, and specifically California law as it relates to partnerships and the fiduciary duties that partners owe one another when creating, operating and withdrawing from a partnership. The Plaintiff and counterclaim defendants, Second Measure, Mr. Babineau and Ms. Chou, assert claims for declaratory relief that overlap with the claims for damages being asserted by Mr. Kim. All of the claims by all parties revolve around the ownership and operation of Second Measure.

Factual Background

Sadly, as noted above, this is a lawsuit between two persons that formerly considered each other to be good friends. These friends, Mr. Kim and Mr. Babineau, co-founded Second Measure in September 2013, with the dream of someday getting rich together through hard work, perseverance and the complimentary nature of their respective areas of expertise.

Mr. Kim is an investment professional with many years' experience in the financial markets. Mr. Babineau is a computer software engineer with experience working with and managing large sets of data. Mr. Kim and Mr. Babineau co-founded Second Measure together with the idea of using large sets of consumer credit card and bank transaction data to identify potential changes in metrics that affect stock prices, and selling that data and related services to hedge funds and venture investors wanting that kind of insight. Mr. Kim wanted the name Second Measure and began advocating for that name shortly after the business was founded because he believed it denoted musicality.

Given their respective professional backgrounds, they agreed that Mr. Babineau, as a computer engineer, would be responsible for enabling access to and organizing the large sets of consumer spending data that Second Measure planned to use. They agreed that Mr. Kim, as the investment professional, would be responsible for figuring out how the data should be applied. Both parties were inexperienced in entrepreneurship and lacked legal training, so they never created a written partnership agreement or similar document. Instead, as explained below, the parties worked together for nearly a year, often well past midnight and on the weekends, creating, testing and building their business.

As explained below in the body of this brief, their actions were more than sufficient to create a partnership under California law, despite the lack of a written partnership agreement. Moreover, although not required to create a partnership, Mr. Kim and Mr. Babineau also orally agreed that their respective interests in Second Measure would be equal, with each of them owning 50% of the business. The two partners spent many months working long hours on many occasions, organizing large data sets, and applying various financial metrics that Mr. Kim formulated to the data. During this time they often worked together until 2 a.m. or 3 a.m., tagging and organizing massive data sets for more than 100 different companies. Like many young, Silicon Valley co-founders, they spent hours working out of each other's apartment as well as many hours together on internet chat forums carrying on back and forth discussions regarding the best methodology and metrics to interpret the data sets.

Consistent with their agreement to be equal partners in Second Measure, they split the costs for running the business 50/50, including server costs and other related infrastructure costs. Everything went well for about a year, until September 2014, when, as explained below, Mr. Babineau decided that he wanted Second Measure for himself.

Even though they were longtime close friends and had spent many hours and late nights together working as a team to make Second Measure a success, in September 2014, Mr. Babineau, and his girlfriend Ms. Chou, who Mr. Babineau had brought into the business to help with technical projects, wrongfully and physically shut Mr. Kim out of

Second Measure by depriving him of access to computer servers and shared online applications to prevent him from doing any further work or accessing the work product he had created up to that date for Second Measure. Mr. Babineau and Ms. Chou thereafter cut off communication with Mr. Kim, while continuing to develop Second Measure's business.

After locking him out of Second Measure in September 2014, Mr. Babineau and Ms. Chou took the next step and wrongfully incorporated Second Measure in Delaware as their own business under the name Second Measure, Inc. They did so without Mr. Kim's consent. Mr. Babineau and Ms. Chou also granted themselves large blocks of stock in the company, and now hold themselves out to the public as the sole founders and majority owners of Second Measure. Mr. Babineau and Ms. Chou then solicited and received venture investments in the business, and provided equity in the business to outside investors. This was also done without Mr. Kim's consent. To this day, Mr. Babineau and Ms. Chou refuse to grant Mr. Kim any ownership interest in the business, and refuse to recognize his status as a co-founder of Second Measure. They have also refused to share any of the profits of the business with him.

Rather than recognizing Mr. Kim's contributions to, and ownership interest in, Second Measure, Mr. Babineau has from the outset taken the remarkable position that the current Second Measure, Inc., the Delaware corporation, is a new and totally unrelated business that he and Ms. Chou conceived of out of the blue, for the first time, after he ejected Mr. Kim from the Second Measure partnership. [redacted] Some of these documents are discussed below. These documents will be presented at trial and will demonstrate beyond any doubt the falsity of Mr. Babineau's claim that the corporation Second Measure is unrelated to the Second Measure partnership he co-founded with Mr. Kim.

Moreover, given the extreme similarity of the nature of the business of Second Measure, Inc. to the Second Measure partnership, it belies credulity for Mr. Babineau to claim that the corporation Second Measure is not a mere continuation, in incorporated form, of the Second Measure partnership he co-founded with Mr Kim. [redacted]

Today, Second Measure the corporation is a valuable and thriving business, thanks in large part to the work of Mr. Kim. Mr. Kim's share of Second Measure was wrongfully taken from him in September 2014, and he will ask that the Court declare a constructive trust over the business and award Mr. Kim his rightful share of the company, and/or substantial monetary damages for the losses he has suffered as a result of Mr. Babineau's conduct.

II. THE EVIDENCE AT TRIAL WILL SHOW BEYOND ANY DOUBT THAT MR. KIM AND MR. BABINEAU FORMED SECOND MEASURE AS A PARTNERSHIP UNDER CALIFORNIA LAW IN SEPTEMBER 2013.

We understand that Mr. Babineau will take the position at trial that he was never in a business partnership with Mr. Kim. The evidence at trial will demonstrate otherwise. Under applicable California law, a partnership is created when two or more persons carry on as co-owners a business for the purpose of making a profit, even if the parties do not intend to create a partnership, and even if they never execute a written partnership agreement. See Cal. Corp. Code Section 1602(a) (defining a partnership as "the association of two or more persons to carry on as co-owners a business for profit . . . whether or not the persons intended to form a partnership. Where there is no agreement to form a partnership "[a] . . . partnership may be . . . assumed to have been organized from a reasonable deduction from the acts and declarations of the parties." Second Measure, Inc. v. Kim, 143 F. Supp. 3d 961, 978 (N.D. Cal. 2015); citing Weiner v. Fleishman, 54 Cal. 3d 476, 492-83 (1991), see also Sterman v. Ziem (1936) 17 Cal.App.2d 414, 418, 62 P.2d 160, 162 ("A partnership is defined in section 2400 of the Civil Code as an association of two or more persons to carry on as copartners a business for profit. That a partnership may be created by the agreement or conduct of the parties, either expressed or implied, has often been recognized. [Citations]. "[T]he voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties.")

The undisputed facts at trial will be more than sufficient to show that Mr. Kim and Mr. Babineau's actions and conduct were legally sufficient to create an implied partnership in Second Measure.[1] The facts will show that Mr. Kim and Mr. Babineau worked many hours together on Second Measure, that they each had their respective spheres of managerial responsibility, and that their goal was to make money off of Second Measure. We anticipate that these facts will be undisputed, and note that Mr. Babineau's existing deposition testimony would be, in and of itself, more than sufficient to establish the formation of a partnership as a matter of law.

Mr. Babineau testified in his deposition that [redacted] These emails, authored by Mr. Babineau, demonstrate beyond any doubt that he believed that he and Mr. Kim were working together as a team for the purpose of making money. As the authorities cited above establish, this is sufficient to form a partnership under California law.

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[1] As noted previously, Mr. Kim also takes the position that the parties agreed orally to a 50/50 partnership in Second Measure. However, Mr. Babineau has denied that any such oral agreement existed. The issue is however moot as the existence of an implied partnership will easily be proved at trial without regard to any express agreement among the parties.

Mr. Kim also anticipates that one of Mr. Babineau's primary trial themes will be his claim that not only did he and Mr. Kim never have a partnership, they never even had a business of any nature. We anticipate he will base this claim on his assertion that he and Mr. Kim's business did not have profits or revenues before September 2014, it had only costs. Mr. Kim respectfully submits that any assertion by Mr. Babineau that a business that has only costs, and no revenues or profits, isn't even a "business" of any nature borders on the absurd. Many well know technology companies are not profitable for years in the beginning and often have only costs, not revenues. In fact, this is the norm for technology companies in Silicon Valley.

Moreover, any claim that a business of any nature never even existed between September 2013 and 2014 is belied by Ms. Chou's counterclaims in this action. Ms. Chou has filed counterclaims in this action alternatively claiming that during the time she performed work from September 2013 until 2014, her rights as an employee under California law were violated in that she was not provided with itemized wage statements and that proper, legally mandated records of her employment were not kept. Of course, it is difficult to understand how such alternative claims could possibly have been filed in good faith if no business of any nature even existed.

III. ONCE MR. KIM AND MR. BABINEAU FORMED A PARTNERSHIP CALIFORNIA LAW PROHIBITED MR. BABINEAU FROM EJECTING MR. KIM FROM THE BUSINESS AND APPROPRIATING IT FOR HIMSELF

As partners in a business, Mr. Babineau owed Mr. Kim a fiduciary duty of undivided loyalty, and that duty continued in certain critical respects even after Mr. Babineau shut Mr. Kim out of the business in September 2014. Specifically, the fiduciary duties that Mr. Babineau owed to Mr. Kim prohibited Mr. Babineau from ejecting Mr. Kim from Second Measure and appropriating the business and the business opportunities it was pursuing for himself. California law is clear that even after a partnership is dissolved or a partner withdraws, that partner has a continuing duty of loyalty "[t]o account to the partnership and hold as trustee for it any property, profit or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property or information, including appropriation of a partnership opportunity." Second Measure, Inc. v. Kim, 143 F. Supp. at 975; citing Cal. Corp. Code Section 16404(b).

Thus, "[a] partner may not dissolve a partnership to gain the benefits of the business for himself, unless he fully compensates his copartner for his share of the prospective business opportunity." Second Measure, Inc. v. Kim, 143 F. Supp. at 975. Mr. Babineau is simply not permitted, as a fiduciary, to throw Mr. Kim out of the business and thereafter keep the fruits of the thousands of hours of work that he and Mr. Kim put into the business for himself. Interserve, Inc. v. Fusion Garage PTE. LTD., 2010 WL 3339520, at *6 (N.D. Cal., Aug. 24, 2010) ("Fusion Garage argues that the terms of the parties' joint venture were simply too uncertain and unsettled to be enforceable. While it may be true that the parties never reached a meeting of the minds on how the business would operate on an ongoing basis, ***their cooperative efforts in developing the product were sufficient to give rise to an obligation on both parties' part not to usurp the fruits of those efforts.***") (emphasis added).

IV. MR. BABINEAU BREACHED HIS FIDUCIARY DUTY OF LOYALTY TO MR. KIM BY INCORPORATING SECOND MEASURE UNDER HIS OWN NAME AND CONTINUING THE BUSINESS WITHOUT MR. KIM.

We anticipate that Mr. Babineau, as he has done in the past in this litigation, will argue that his conduct was lawful, asserting that he had the right to dissolve Second Measure at any time and then "compete" with the partnership. Indeed, we anticipate that this will be a major theme of Mr. Babineau's defense to Mr. Kim's claims. However, any such contention is plainly contrary to California law. As the Court recognized earlier in this case, the right to "compete" does not include the right to withdraw from a partnership and appropriate partnership business. Second Measure, Inc. v. Kim, 143 F. Supp. 3d at 976 ("[e]ven if Babineau had withdrawn from the partnership in September 2014, the ongoing obligations arising from his joint venture or partnership agreement would have prevented him appropriating the business for himself.")

This is an accurate statement of California law. The California Supreme Court has expressly held that a partner cannot dissolve or withdraw from a partnership (even lawfully) and then continue to pursue the business opportunity that the partnership was pursuing. Doing so constitutes a breach of the fiduciary duty of loyalty. As the California Supreme Court stated in the often-cited case of Leff v. Gunter, 33 Cal. 3d 508, 514 (1983)

> The instructions advise the jury that a partner's duty not to compete with his partnership with respect to a partnership opportunity which is actively being pursued by the partnership *survives his withdrawal therefrom*. Defendants have cited no contrary authority. Nor do defendants assert any persuasive reason in logic or principle which relieves a partner from such continuing duty. There is an obvious and essential unfairness in one partner's attempted exploitation of a partnership opportunity for his own personal benefit and to the resulting detriment of his copartners. It may be assumed, although perhaps not always easily proven, that such competition with one's own partnership is greatly facilitated by access to relevant information available only to partners. *Moreover, it is equally obvious that a formal disassociation of oneself from a partnership does not change this situation unless the interested parties specifically agree otherwise. It is no less a violation of the trust imposed between partners to permit the personal exploitation of that partnership information and opportunity to the prejudice of one's former associates by the simple expedient of withdrawal from the partnership.*

Id. at 514. (emphasis added); see also Interserve, Inc. v. Fusion Garage PTE. LTD., 2010 WL 3339520, at *5 ("The flaw in this argument is that any partner or joint venturer generally *does* have the unilateral right to dissolve the relationship. ***The only caveat is that doing so does not immediately end the fiduciary duties, or the obligation of the dissolving party to "fully compensate[ ] his copartner for his share of the prospective business opportunity***.") (emphasis added.)

California law therefore unquestionably supports Mr. Kim's position that Mr. Babineau was not free to eject Mr. Kim from the partnership and appropriate the business and its business opportunities for himself, which is exactly what he did.

V. SECOND MEASURE THE CORPORATION IS A DE FACTO CONTINUATION OF SECOND MEASURE THE PARTNERSHIP

We anticipate that another major theme of Mr. Babineau's defense will be his claim that the current iteration of Second Measure, which is a corporation, is a new and completely unrelated business that he created after he threw Mr. Kim out of the Second Measure partnership, and that Second Measure the corporation has no connection to Second Measure the partnership. The evidence at trial, including many admissions on this very point by Mr. Babineau, will show that this contention is utterly false. [redacted]

[redacted]

Mr. Kim submits that these and other documents authored by Mr. Babineau demonstrate beyond any doubt that Second Measure the corporation is a mere de facto continuation of the business of Second Measure the partnership. When it was convenient for Mr. Babineau to date the founding of Second Measure the corporation to September 2013 (the exact time he began working with Mr. Kim on Second Measure), he did so. It was only after this litigation was filed that he changed his story and began claiming that Second Measure the corporation represented a new and different business that he created from scratch after he ejected Mr. Kim from Second Measure the partnership.

VI. IMPOSITION OF A CONSTRUCTIVE TRUST OVER SECOND MEASURE AND/OR ITS EQUITY SECURITIES IS A PROPER REMEDY FOR MR. KIM'S CLAIMS FOR BREACH OF FIDUCIARY DUTY.

If Mr. Kim proves a breach of fiduciary duty at trial, the imposition of a constructive trust over all ill-gotten gains by Mr. Babineau, including the business that he took from Mr. Kim which now goes by the name Second Measure, Inc., and/or the equity securities of Second Measure, Inc., is the proper remedy. Lund v. Albrecht (9th Cir. 1991) 936 F.2d 459, 464 (holding with respect to a partnership dispute that "[a] constructive trust is an available remedy for constructive fraud and breach of fiduciary duty.") In addition "[c]onstructive trust is a remedy, not a cause of action" (id), and, even though it may be equitable in nature, it is available without any showing that damages would constitute an adequate remedy at law. Heckmann v. Ahmanson (1985) 168 Cal.App.3d 119, 134 ("[i]n

California, as in most jurisdictions, an action in equity to establish a constructive trust does not depend on the absence of an adequate legal remedy.")

Mr. Kim intends to prove at trial that Mr. Babineau breached his fiduciary duties to his partner Mr. Kim by wrongfully throwing him out of their business, wrongfully appropriating it for himself, and then incorporating the business under his name and Mr. Chou's as Second Measure, Inc. The imposition of a constructive trust is an appropriate remedy in these circumstances.[2]

VII. CONCLUSION

Counsel for Mr. Kim will be prepared to discuss these and other matters at the May 19, 2017 pre-trial conference.

Respectfully submitted.

DATED: April 18, 2017

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[2] In a prior meet and confer counsel for Mr. Babineau suggested that the court may lack the power to impose a constructive trust since it was not specifically requested in any pleading. This contention has no merit as Federal Rule of Civil Procedure 54(c) expressly provides that, except with respect to default judgments, "every final judgment should grant the relief to which each party is entitled, **even if the party has not demanded that relief in its pleadings**.") See Fed. R. Civ. Proc. 54(c) (emphasis added); see also PCO, Inc. v. Christensen, Miller, Fink, Jacobs Glasser, 150 Cal App. 4th 384, 398 2007 ("[a] constructive trust however, is an equitable *remedy*, not a substantive claim for relief") (emphasis in original). Moreover, Mr. Kim did pray for an award of an ownership interest in Second Measure in his Counterclaim. See Counterclaim, Prayer.